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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

STEVEN KING AINSWORTH,

NO. CIV. S-90-329 LKK/PAN

Petitioner,

v.

DEATH PENALTY CASE

ARTHUR CALDERON, Warden, et al.,

O R D E R

Respondents.

/

I.

PROCEDURAL HISTORY

Petitioner Steven King Ainsworth is a state prisoner sentenced to die after being convicted of first degree murder in the course of armed robbery and kidnaping. He brings this § 2254 petition to challenge the constitutionality of his death sentence. The claims relating to the guilt phase of his state court trial having been resolved previously, the court now turns to the asserted defects in the penalty phase.

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1 A. FACTS GIVING RISE TO THE CONVICTION¹

2 At approximately 3:00 p.m. on September 12, 1978, petitioner
3 and Donald Bayles robbed Nancy Seng Huynh in a public parking lot
4 in Sacramento. In the course of robbing Ms. Huynh, Ainsworth shot
5 her in the right hip with a .45 caliber handgun. Ainsworth and
6 Bayles then abducted Huynh in her car, fleeing north from
7 Sacramento on back roads and using money from her purse to purchase
8 beer and gas. When the trio exited the parking lot, Huynh was
9 alive and seated upright in the front seat between Bayles and
10 Ainsworth.

11 Bayles testified that Huynh remained alive for many hours
12 after the shooting, repeatedly asking for help and a doctor.
13 Bayles claims that he urged Ainsworth to take Huynh to a doctor,
14 but that Ainsworth refused. Bayles also accused Ainsworth of
15 raping Huynh. Bayles testified that he did not realize that Huynh
16 was dead until about 24 hours after they had abducted her from
17 Sacramento.

18 Ms. Huynh's body was found on January 20, 1979, in Elk Creek,
19 California. When discovered, it was naked from the waist down and
20 badly decomposed. Ainsworth and Bayles disposed of the body there
21 and then headed for the Bay Area, picking up a hitchhiker near the
22 Golden Gate Bridge and dropping him off in downtown San Francisco.
23 They then drove to Mori's Point, less than a mile from petitioner's
24 Pacifica residence, abandoned the car, and separated.

25
26 ¹ All facts summarized here are drawn from the trial record
unless otherwise noted.

1 When Ainsworth was finally arrested for the crime in San
2 Francisco on May 3, 1979, Ainsworth used a false name and said to
3 his companion, "That's it babe. This is sayonara."

4 **B. THE GUILT PHASE**

5 Ainsworth and Bayles were tried as co-defendants. Ainsworth
6 declined to testify and Bayles shifted all blame for Huynh's death
7 to Ainsworth. At the trial, the state abandoned the theory that
8 petitioner intended to kill Huynh at the time that he shot her.
9 Instead, the state argued that Ainsworth was guilty of first degree
10 murder with special circumstances because he deprived Huynh of
11 medical care after shooting her, and because Huynh would have lived
12 if Ainsworth had obtained medical treatment for her. In its case-
13 in-chief, the state elicited testimony from pathologist Dr. Joseph
14 Masters that the cause of death was a bullet wound injury of the
15 pelvis, but he could not determine whether the victim had died
16 within seconds or days after sustaining the injury. The
17 pathologist opined that under certain circumstances treatment would
18 have saved Huynh's life. Ainsworth's trial counsel neither
19 interviewed Dr. Masters before trial, nor sought other medical
20 advice.

21 After the state presented its case-in-chief, Ainsworth moved
22 for acquittal on the special circumstances charges pursuant to
23 Penal Code § 1118.1.² The trial judge, the Honorable Joseph A.

24 ² That statute provides:
25
26 "In a case tried before a jury, the court on motion of
the defendant or on its own motion, at the close of the

1 DeCristoforo, summarily denied the motion. On January 2, 1980, the
2 jury convicted Stephen King Ainsworth of first degree murder with
3 special circumstances, and Donald Bayles of second degree murder
4 with special circumstances.

5 **C. THE PENALTY PHASE**

6 The penalty phase of the state proceedings commenced on
7 January 4, 1980. The trial court first heard several motions from
8 defense counsel, namely: that (then) Cal. Penal Code § 190.3 was
9 unconstitutional; that a new jury should be empaneled for the
10 penalty phase or, in the alternative, that the current jury be
11 questioned for bias; and that the prosecution should be barred from
12 relitigating petitioner's prior criminal history, or that defense
13 counsel be afforded time to investigate petitioner's criminal
14 history before commencing the penalty phase. After denying the
15 motions, see Reporter's Transcript on Appeal ("RTA") 3232-3257, the
16 jury was convened to hear evidence regarding petitioner's sentence.
17 Although the prosecutor delivered an opening statement,
18 petitioner's trial counsel, Brian Christiansen, did not. RTA 3261.

19 As evidence in aggravation, the prosecution presented a
20 stipulation as to petitioner's two prior armed robbery convictions
21 - one in 1968 and the other in 1972. The prosecution also

22 evidence on either side and before the case is submitted
23 to the jury for decision, shall order the entry of a
24 judgment of acquittal of one or more of the offenses
25 charged in the accusatory pleading if the evidence then
before the court is insufficient to sustain a conviction
of such offense or offenses on appeal"

26 Cal. Penal Code § 1118.1.

1 presented testimony of the aggressive and violent behavior
2 exhibited by petitioner after he shot Ms. Huynh but before he was
3 apprehended. First, the state called Jay Campagna, who testified
4 that two days after the murder petitioner held him up at gunpoint
5 in the San Francisco convenience store where Campagna was employed,
6 and stole \$200. RTA 3265-3270. The state also called witness
7 Robert Holley, who asserted that, on April 29, 1979, after he and
8 petitioner had consumed four or five friendly beers at Mr. Holley's
9 home, petitioner hit him on the head and strangled him until he
10 lost consciousness, while directing petitioner's wife to remove
11 some of Mr. Holley's belongings from the apartment. RTA 3270-3278.
12 Lastly, the state called Dennis Ribble, who testified that about
13 a week after Huynh was shot, petitioner declined Ribble's offer to
14 purchase petitioner's gun. Ribble explained that petitioner told
15 him that the gun "was hot" and that he "had shot a man in
16 Sacramento" with it while robbing a liquor store. RTA 3299-3300.

17 As evidence in mitigation, the defense called petitioner's
18 sixteen-year-old niece, Sherry Donsing. Ms. Donsing testified that
19 her uncle was a talented painter, that he treated animals very
20 kindly, and that she had never seen him hurt anyone or carry a gun.
21 RTA 3282-3284. The defense also called petitioner's sister, Carol
22 Donsing, who testified that their father had committed suicide
23 sixteen years prior, that she never saw petitioner carry a gun, and
24 that petitioner finished high school and attended some college.
25 RTA 3284-3286. Also called on petitioner's behalf was Hazel
26 Deacon, who lived with petitioner in 1977-1978. She attested that

1 while they lived together, petitioner held a full-time job and
2 never "brutalized" her or anyone else in her presence. She also
3 described a time when an auto accident happened near their home,
4 and petitioner responded immediately by comforting an injured girl
5 until the fire department arrived. RTA 3292-3304. Finally,
6 petitioner called Coleen Yoho, who was petitioner's employer and
7 landlord in 1978-1979. She stated that petitioner performed
8 maintenance and carpentry for her and her husband, and that he was
9 a good worker. RTA 3304-3307.

10 In closing, the state argued that a sentence of death was
11 proportionate to both the crime and the defendant. The state
12 suggested that the jury should avoid appeals to sympathy or
13 emotion, but rather consider the circumstances attendant to
14 petitioner's conviction, as established by the evidence produced
15 during the guilt phase. RTA 3309-3323. In response, defense
16 counsel appealed to the juror's morality and asked them to consider
17 the inhumanity of the death sentence, and to consider the
18 alternative sentence - being put in a cage for life - as a
19 sufficient consequence. Defense counsel also observed that the law
20 does not establish a preference for one sentence over the other.
21 RTA 3323-3330.

22 After being instructed by the court, RTA 3330-3333, the jury
23 deliberated for approximately one day and returned a sentence of
24 death. RTA 3340. On January 30, 1980, the trial court rejected
25 petitioner's motion for a modification of the sentence and affirmed
26 the jury's verdict. RTA 3347-3366.

1 D. PETITION FOR HABEAS CORPUS

2 After his judgment and sentence was upheld by the California
3 Supreme Court, see People v. Ainsworth, 45 Cal.3d 984 (1988), and
4 the United States Supreme Court denied certiorari, see Ainsworth v.
5 California, 488 U.S. 1050 (1989) (Brennan, J. and Marshall, J.
6 dissenting), petitioner filed his § 2254 application in this court
7 asserting twenty-nine claims of constitutional error.

8 Prior to reaching the merits of petitioner's claims, this
9 court issued several orders, including a ruling that the magistrate
10 judge properly exercised his discretion in conducting a Neuschaefer
11 hearing concerning the existence of any unexhausted claims. See
12 Ainsworth v. Vasquez, 759 F.Supp. 1467 (E.D. Cal. 1991) (Levi, J.,
13 en banc). The court also concluded that the amendments to § 2254
14 in the 1996 Antiterrorism and Effective Death Penalty Act (AEDPA)
15 did not apply to this petition. See Order filed August 23, 1996.

16 Regarding the merits, the magistrate judge first considered
17 the several claims relating to the guilt phase of petitioner's
18 trial, recommending that those claims be denied. Amended Findings
19 and Recommendations ("F&Rs") filed June 5, 1995. However, I
20 declined to adopt the recommendation as to petitioner's claim of
21 ineffective assistance of counsel, and vacated his sentence.³ On

22 ³ In his habeas petition, Ainsworth presented scientific
23 evidence that there were at least three feasible scenarios in which
24 resort to medical care would have been fruitless. Ainsworth argued
25 that had his trial counsel elicited an expert opinion that the
deprivation of medical care may not have caused the death - i.e.
the death was an inevitable consequence of the initial shooting -
there is a reasonable probability that the outcome of the trial
would have been different. I concluded that trial counsel's

1 appeal, the Ninth Circuit reversed, and issued a mandate for the
2 district court to resolve petitioner's penalty phase claims.⁴ Upon
3 consent of the parties, I declined to refer the remaining issues
4 to the magistrate judge, and instead retained jurisdiction over the
5 resolution of penalty phase claims.

6 **E. PENALTY PHASE CLAIMS**

7 Petitioner asserts that the following errors rendered his
8 penalty phase trial constitutionally infirm:

9 R. Ineffective assistance of counsel at penalty phase;
10 S. Denial of continuance to investigate;
11 T. Use of invalid prior conviction;
12 U. Jury instructions on other crimes;
13 V. Use of absence of mitigation as aggravation;
14 W. Use of prior bad acts as aggravating factor;
15 X. Improper argument about victim's family;
16 Y. Defense argument about execution;
17 Z. Instruction on burden of proof;
18 AA. Denial of right to full consideration of mitigation
19 evidence; and
20 BB. The cumulative effect of the foregoing alleged errors.

21 The parties agreed that those claims were to be resolved on the
22 briefings and evidence already submitted, save for supplemental
23 briefing as to intervening change in law. The record is now
24 complete⁵, including: twenty-four exhibits appended to the petition

25 failure to investigate and present this evidence undermined the
26 outcome of the trial, then ordered the death sentence overturned.
See Order filed August 23, 1996.

⁴ The appeals court held that the experts' declarations proffered to the district court would not have added any new evidence that was not already before the jury. See Ainsworth v. Calderon, 152 F.3d 1223 (9th Cir. 1998).

⁵ Regarding the evidentiary record before the court, the court previously concluded that petitioner's objections to the magistrate judge's order filed April 5, 1996 rejecting petitioner's

1 filed March 16, 1990; four declarations submitted with petitioner's
2 motion for summary judgment filed June 25, 1993, the transcript of
3 the oral deposition of Ainsworth's trial counsel, Brian
4 Christiansen, lodged August 31, 1994; petitioner's answers to
5 interrogatories filed December 18, 1995; and seventy-four exhibits
6 lodged in February 1996. Thus I turn to the merits of petitioner's
7 penalty phase claims.

8 **II.**

9 **APPLICABLE LAW**

10 At the time of petitioner's state court trial, California
11 Penal Code § 190.3⁶ provided that when a defendant has been found
12 guilty of first degree murder, and one or more of the special
13 circumstances enumerated in § 190.2 is found to be true, the trier
14 of fact must determine whether the penalty shall be death or
15 confinement in state prison for life without possibility of parole.
16 In determining which sentence to impose, the decision-maker is
17 directed to take into account specific factors relating to the
18 crime and to the defendant,⁷ and to "be guided by the aggravating

19 request to expand the record to include post-trial artwork and
20 expert opinion were without merit. See Order filed May 21, 1996.

21 ⁶ Unless otherwise noted, all references to the California
22 Penal Code are to those provisions in effect at the time of
petitioner's crime.

23 ⁷ The statute in effect at the time of the offense conduct
24 required the trier of fact to take into account:

25 (a) The circumstances of the crime of which the
26 defendant was convicted in the present proceeding and
the existence of any special circumstances found to be
true pursuant to Section 190.1.

¹ and mitigating circumstances." Penal Code § 190.3.

III.

CLAIM R -- INEFFECTIVE ASSISTANCE AT PENALTY PHASE

4 In claim R, petitioner asserts that Mr. Christiansen's
5 inadequate performance during the penalty phase violated his Sixth

(b) The presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence.

(c) Whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(d) Whether or not the victim was a participant in the defendant's homicidal conduct or consented to the homicidal act.

(e) Whether or not the offense was committed under circumstances which the defendant reasonably believed to be a moral justification or extenuation for his conduct.

(f) Whether or not defendant acted under extreme duress or under the substantial domination of another person.

(g) Whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect, or the affects of intoxication.

(h) The age of the defendant at the time of the crime.

(i) Whether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor.

(j) Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime.

At the time of Huynh's murder, a 1978 state ballot initiative amending this section had not yet been approved. See Cal. Penal Code § 190.3, Historical Note (West's Annotated, 1988).

1 Amendment right to counsel. Petitioner contends that his trial
2 counsel failed to conduct any investigation of mitigating
3 circumstances which might offset the evidence supporting his
4 eligibility for the death sentence, and that the presentation of
5 petitioner's defense during the penalty phase fell far below that
6 to which he was constitutionally entitled.

7 **A. STANDARDS**

8 Whether defense counsel's performance is constitutionally
9 adequate is measured by the well-known standard set forth in
10 Strickland v. Washington, 466 U.S. 668 (1984), and its progeny.
11 The right to effective assistance of counsel applies with equal
12 force at the penalty phase of a bifurcated trial. Clabourne v.
13 Lewis, 64 F.3d 1373, 1378 (9th Cir. 1995). A claim of ineffective
14 assistance of counsel is a mixed question of law and fact and is
15 reviewed de novo. United States v. Angelone, 894 F.2d 1129, 1130
16 (9th Cir. 1990).

17 As Strickland teaches, petitioner can prevail on his Sixth
18 Amendment claim where counsel's deficient performance undermines
19 the court's confidence in the outcome of the sentencing. The two-
20 prong test first requires petitioner to show that trial counsel's
21 performance fell below the wide range of professional competent
22 assistance. Id. at 688; Hughes v. Borg, 898 F.2d 695, 702 (9th
23 Cir. 1990). If so, then petitioner must show that counsel's
24 inadequate performance prejudiced the penalty phase. Prejudice is
25 established where the reviewing court's confidence in the sentence
26 is undermined by trial counsel's failure to reasonably represent

1 the defendant. See Baylor v. Estelle, 94 F.3d 1321, 1324 (9th Cir.
2 1996). Implicit in this inquiry is whether "counsel's deficient
3 performance renders the result of the trial unreliable or the
4 proceeding fundamentally unfair." Lockwell v. Fretwell, 506 U.S.
5 364, 372 (1993) (such unfairness results where defendant was
6 deprived of substantive or procedural entitlements). Thus,
7 petitioner must establish that there is a "reasonable probability
8 that, but for counsel's professional errors, the result of the
9 proceeding would have been different." Strickland, 466 U.S. at
10 694. In this context, prejudice means a reasonable probability
11 that a different sentence would have been imposed. Mak v.
12 Blodgett, 970 F.2d 614, 619 (9th Cir. 1992).

13 **B. INADEQUATE PERFORMANCE**

14 **1. Preparation and Investigation for Sentencing Phase**

15 The record establishes that counsel's preparation in advance
16 of the penalty phase was minimal. There is no evidence to support
17 counsel's vague belief that he hired an investigator. Christiansen
18 Depo. at 23:16-25:1 and Petitioner's Penalty Phase Exhibit ("Pet.
19 Exh.") No. 63. It is undisputed that he did not have a law clerk
20 or paralegal working with him on this case. Christiansen Depo. at
21 23:10-15. He later admitted that he abdicated the investigation
22 of petitioner's psychosocial history to one of petitioner's
23 relatives. Id. at 42:1-9. He also moved for a new trial, in part
24 because he failed to investigate the issue of petitioner's sanity.
25 RTA 3349. There is no genuine dispute that counsel failed to
26 ////

1 examine petitioner's military record⁸, prison record, or prior
2 criminal history. Christiansen Depo. at 42:23-43:1. He obtained
3 the police reports of petitioner's prior convictions only the day
4 before the commencement of the penalty phase, RTA 3245, even though
5 he had been on notice for two-and-a-half months that the state
6 intended to present evidence of petitioner's prior criminal record
7 as evidence in aggravation. Christiansen Depo., Exh. 1. He all
8 but acknowledged his unpreparedness when he unsuccessfully moved
9 for a continuance of the penalty phase so that he could prepare a
10 rebuttal to the state's proffer of petitioner's prior criminal
11 history. RTA 3245.

12 Counsel's handling of his witnesses during the penalty phase
13 is also evidence of his inadequate investigation and preparation.
14 As I explain in more detail below, the oral examinations failed to
15 adduce substantive evidence in mitigation, and in one instance
16 actually contributed to the evidence in aggravation.

17 In contrast, the investigation conducted subsequently on
18 appeal consisted of a review of petitioner's California Department
19 of Corrections file, and interviews of petitioner, his sister, and
20 his maternal aunt. Pet. Exh. No. 64. Petitioner's state habeas
21 counsel also obtained the probation report arising from the 1967
22 and 1972 convictions, see Pet. Exh. Nos. 24 & 36, the records of
23 petitioner's hospital admission in 1964 for acute alcoholism, see
24

25 ⁸ Mr. Christiansen admitted at deposition that he did not
26 even know that petitioner had been in the military. Christiansen
Depo. at 61:20-21.

1 Pet. Exh. No. 22, and portions of petitioner's Army record. Pet.
2 Exh. No. 13.

3 The post-trial investigation produced evidence that
4 petitioner's parents were volatile alcoholics who often fought
5 amongst themselves and possibly neglected the children physically
6 and emotionally. Petitioner's father was apparently a "womanizer,"
7 who beat petitioner with a riding crop, and attempted to kill
8 petitioner two or three times, all before committing suicide when
9 petitioner was nineteen. Petitioner began ingesting intoxicating
10 substances as early as age five, when he drank the dregs of his
11 parents alcoholic beverages, and may have been an alcoholic by age
12 sixteen when he attempted suicide. Pet. Exh. Nos. 17, 20 & 64.

13 Although petitioner joined the Army in 1961 when he was
14 seventeen and was a productive soldier at first, he ultimately was
15 discharged as undesirable due to his addiction to alcohol and
16 morphine, a diagnosis of antisocial personality, and a civilian
17 forgery charge. Pet. Exh. Nos. 13 & 24. The discharge occurred
18 five months after his father's suicide.⁹

19 After committing a string of misdemeanors, petitioner was
20 convicted of armed robbery in Sacramento County in 1968.
21 Petitioner was paroled in September 1971 and enrolled in college,
22 but soon dropped out. In 1972, he was again arrested for armed

23
24 ⁹ The evidence suggests that petitioner has felt particularly
25 tormented at times, to the point of suicide, over his father's
26 death. Pet. Exh. No. 22. Petitioner's suicidal thoughts were not
uncommon in his family of origin. In addition to his father, a
handful of other relatives had either committed or attempted
suicide. Pet. Exh. No. 3.

1 robbery after holding up a pharmacy in Yuba County in order to
2 obtain prescription drugs and money. His parole was revoked and,
3 after he pleaded guilty, he was returned to prison until January
4 1977. Pet. Exh. Nos. 28 & 33-37.

5 On appeal, petitioner obtained expert testimony which would
6 have been available at the time of trial had his trial counsel
7 investigated. Petitioner's prison records associated with his
8 prior convictions prompted a corrections expert to classify
9 petitioner as an "above average prisoner" who would pose no threat
10 to prison officers or other inmates if sentenced to life in prison.
11 Pet. Exh. No. 70. Petitioner apparently adjusted well to prison
12 life, and completed his high school requirements during his first
13 imprisonment. Pet. Exh. No. 8. Expert testimony gathered by post-
14 trial counsel diagnoses petitioner of suffering from both mental
15 illness and substance abuse, and relates these condition to the
16 physical and psychological abuse he suffered as a child. Pet. Exh.
17 No. 71-72. These expert explanations would have been admissible
18 as mitigating evidence relative to the character of a convict who
19 is eligible for the death penalty. See Cal. Evid. Code § 801;
20 People v. Murtishaw, 29 Cal.3d 733, 774 n.39 (1981); and Lockett
21 v. Ohio, 438 U.S. 586, 608 (1978).

22 In sum, trial counsel could have interviewed family members
23 and health care providers, could have reviewed petitioner's
24 official records, and could have retained experts to testify to the
25 significance of this evidence. Such an investigation if conducted
26 at the time of trial would have readily disclosed evidence of:

1 parents who were depressed, alcoholic, abusive and neglectful; a
2 history of suicide and attempted suicide in the family; early
3 alcohol consumption and alcoholism; drug dependency; diagnosed
4 mental disorders; notable behavior in prison; and above-average
5 intelligence and artistic talent. None of this evidence was
6 investigated nor discovered by Mr. Christiansen.¹⁰

7 **2. Presentation of Mitigating Evidence**

8 Trial counsel's lack of preparation for the penalty phase was
9 painfully evident during the presentation of his case. The
10 mitigating evidence presented on petitioner's behalf consisted of
11 short examinations of four witnesses.¹¹ First, the defense called
12 petitioner's niece, Sherry Donsing, who was just sixteen years old
13 at the time. Providing short answers, she testified that she went
14 fishing and to the mountains with "Uncle Steve," that he took her
15 to the mountains and to go fishing, that he treated animals "very
16 kindly," that she had never seen him hurt anybody or carry a gun,
17 and that he "paints and draws." RTA 3281-3283.

18 Next, the defense called Sherry's mom and petitioner's sister,
19 Carol Donsing, who stated simply that petitioner's father had
20

21 ¹⁰ Whether or not all of the evidence, such as the expert
22 testimony, would have actually been adduced at the penalty phase,
23 investigation into this information would have informed counsel's
24 capacity to argue on petitioner's behalf those circumstances in
mitigation and to focus the jurors' attention on the circumstances
in petitioner's background which perhaps militated against the
death penalty.

25 ¹¹ The testimonial evidence presented by Mr. Christiansen
26 consumes only twelve and a half pages of trial transcript. RTA
3281-3287, 3302-3309.

1 committed suicide. She also testified that other than having
2 "tussles" with petitioner, he never hurt her, or anyone else in her
3 presence. She stated that petitioner had "some college in San
4 Francisco," and that petitioner was married. RTA 3283-3286. On
5 cross-examination, the state elicited the fact that for most of the
6 time from 1968-1978, petitioner was in prison. RTA 3286-3287.

7 Trial counsel then called petitioner's former girlfriend,
8 Hazel Deacon, who attested that, during the year she lived with
9 petitioner, he worked full-time, he never "brutalized" her, he
10 comforted a child who had been in a car accident, and that they
11 talked about getting married "a couple of times." RTA 3302-3304.
12 Counsel's lack of preparation led to the admission of evidence in
13 aggravation when he questioned Ms. Deacon whether she had ever seen
14 petitioner with a firearm - to which she simply replied, "Yes."
15 RTA 3303. Of course, that admission allowed the prosecution to
16 elicit from Ms. Deacon on cross-examination that petitioner
17 possessed the gun near "the very end of September or very beginning
18 of October [of 1977]" and that petitioner "was planned on robbing
19 a bank, only there was too many police around." RTA 3304-3305.

20 Last, counsel called Coleen Yoho, who became petitioner's
21 landlord and employer in San Francisco shortly after Hunyh's death.
22 She stated that he was a good worker, and that she and her husband
23 sometimes socialized with petitioner and his wife. She stated that
24 during the six months she knew him, she never saw him attack anyone
25 or carry a firearm. RTA 3305-3307.

26 ////

1 After this abbreviated testimony, Mr. Christiansen's brief
2 closing argument - comprising seven pages of trial transcript -
3 never even referenced any of the evidence that he did present. RTA
4 3324-3330. Indeed, the absolute want of any link between the
5 meager evidence presented, the substance of Mr. Christiansen's
6 closing argument, and the relevant legal inquiry when considering
7 a sentence of death, see Cal. Pen. Code § 190.3, establishes that
8 counsel's representation was inadequate.¹² Of course, the question
9 is whether counsel's inadequate performance was constitutionally
10 infirm.

11 3. Measuring Counsel's Performance

12 There is a strong presumption that defense counsel's
13 performance falls within the wide range of reasonably professional
14 assistance and thus great deference must be afforded to the manner
15 in which counsel defended his client. Sanders v. Ratelle, 21 F.3d
16 1446, 1456 (9th Cir. 1994). Nonetheless, at the very least,
17 counsel has a duty to investigate aspects of petitioner's character
18 and background, as well as any other evidence which could be
19 offered in mitigation of the death penalty. Skipper v. South
20 Carolina, 476 U.S. 1 (1986); Lockett v. Ohio, 438 U.S. 586, 608
21 (1978); and Williams v. New York, 337 U.S. 241 (1949). While that

22

23 ¹² The court can hardly understand counsel's failure to
24 recollect most anything of substance about representing Mr.
25 Ainsworth. His deposition testimony taken in 1991 about his trial
26 preparation and tactical decisionmaking is punctuated by his
failure to recall or remember virtually every aspect of his
investigation and the proceedings. This despite the fact that this
was his very first death penalty case.

1 duty is limited to those investigations which are reasonable and
2 deference shall be afforded to counsel's trial tactics accordingly,
3 an attorney's performance will be found deficient where the
4 attorney "neither conducted a reasonable investigation nor
5 demonstrated a strategic decision for failing to do so." Hendricks
6 v. Calderon, 70 F.3d 1032, 1036 (9th Cir. 1995), cert. denied, 517
7 U.S. 1111 (1996). This principle "is so fundamental that the
8 failure to conduct a reasonable pretrial investigation may in
9 itself amount to ineffective assistance of counsel." United States
10 v. Tucker, 716 F.2d 576, 582 n.16 (9th Cir. 1983). Thus, where a
11 particular line of potentially mitigating evidence is not
12 investigated there must be some evidence that the decision not to
13 investigate was "the product of a reasoned choice." Correll v.
14 Stewart, 137 F.3d 1404, 1412 (9th Cir. 1998).

15 Here, the record establishes that Mr. Christiansen may have
16 spoken with one of his four witnesses for ten minutes on the
17 morning of her testimony during the penalty phase, see Pet. Exh.
18 No. 68, and that he may have obtained some of petitioner's school
19 records. Christiansen Depo. at 42:28. No other evidence of any
20 preparation for the penalty phase exists. Nor could counsel later
21 recall what steps he may have taken to decide to decline to
22 investigate, or how he arrived at his strategic plan for the
23 penalty phase. As post-trial counsel has demonstrated, mitigating
24 evidence was available had trial counsel searched for it. Because
25 there is no evidence which suggests that Mr. Christiansen's failure
26 to investigate and obtain mitigating evidence was the product of

1 reasonable judgment or tactical decisionmaking, counsel did not
2 meet his constitutional duty to prepare for the defense of his
3 client. Clabourne v. Lewis, 64 F.3d 1373, 1385 (9th Cir. 1995)
4 (finding counsel incompetent where there were no tactical reasons
5 for failing to investigate and present available evidence of
6 mitigation).

7 As I detail more thoroughly below, counsel's lack of
8 preparation and investigation also deprived petitioner of his
9 constitutional entitlement to have mitigating evidence presented
10 on his behalf. See Skipper v. South Carolina, 476 U.S. 1 (1986)
11 and Lockett, 438 U.S. at 586. Where a penalty phase defense is so
12 disorganized and cursory as the one provided by Mr. Christiansen,
13 counsel's performance falls below the objective standard of
14 reasonableness under Strickland. Bean v. Calderon, 163 F.3d 1073,
15 1078 (9th Cir. 1998). I thus conclude that trial counsel's
16 performance was constitutionally deficient.

17 C. PREJUDICE

18 I now turn to whether counsel's incompetence prejudiced the
19 outcome of petitioner's sentence. During the penalty phase, the
20 state presented its case by adducing evidence in aggravation and
21 arguing the relevance of that evidence to each of the ten factors
22 which the factfinder was directed by statute (and in this case by
23 the jury instructions) to consider when deciding whether to affix
24 a sentence of death.¹³ To illustrate how counsel's failure to

25
26 ¹³ The applicable statute instructed the trier of fact to
"consider, take into account and be guided by such aggravating and

1 present or argue evidence in mitigation impacted the penalty phase,
2 I make the following findings based upon the trial transcript.

3 1. Enumerated Factors

4 a. Present Conviction

5 The jury was first asked to consider "[t]he circumstances of
6 the crime of which the defendant was convicted in the present
7 proceeding and the existence of any special circumstances found to
8 be true pursuant to Section 190.1." Cal. Penal Code § 190.3(a).
9 Since the same jury heard the evidence of the crime during the
10 guilt phase and rendered a unanimous verdict as to petitioner's
11 culpability, the prosecutor presented no evidence as to this factor
12 in the penalty phase.

13 However, during his closing argument the prosecutor asked the
14 jury to consider whether the death penalty was "proportionate to
15 and appropriate for the circumstances of this crime." RTA 3310.
16 He urged the jurors "not to detach [themselves] totally from the
17 awful, awful facts of this case," but rather to have "a sense of
18 righteous indignation about" them. RTA 3312. He classified the

19 mitigating circumstances" as are enumerated below. Cal. Penal Code
20 § 190.3. The trial court instructed the jurors to "consider, take
21 into account, and be guided by the following factors, if
22 applicable." RTA 3331. Although the prosecutor spoke of the
23 enumerated factors as "aggravating" and "mitigating," RTA 3315,*passim*, the jury was not instructed by the court to consider the
24 evidence in those exact terms. Because the applicable 1977 statute
25 was a "nonweighing" statute, see Williams v. Calderon, 52 F.3d
1465, 1479 (9th Cir. 1995) (1977 California death penalty law
crafted a nonweighing regime), the trial court's omission of these
terms is probably less important than whether mitigating evidence
was in fact presented to the factfinder. See, e.g., Skipper v.
South Carolina, 476 U.S. 1 (1986) and Lockett v. Ohio, 438 U.S. 586
(1978).

1 crime committed by petitioner as totally lacking in humanity. RTA
2 3314-15.

3 In response, defense counsel asked the jurors to reflect on
4 the notion that, even if they believed that petitioner was guilty
5 beyond reasonable doubt, if they retained any possible doubt that
6 he was guilty of special circumstance murder then they should
7 select life without possibility of parole. RTA 3326-27.

8 b. Prior Criminal or Violent Activity

9 The jury was also instructed to consider "[t]he presence or
10 absence of criminal activity by the defendant which involved the
11 use or attempted use of force or violence or the express or implied
12 threat to use force or violence." Cal. Penal Code § 190.3(b). The
13 state offered a stipulation of petitioner's two prior arrests and
14 convictions for armed robbery.¹⁴ RTA 3261. Called on behalf of
15 the state was convenience store employee Jay Campagna who testified
16 that petitioner robbed the store on September 14, 1978 while
17 pointing a gun at Campagna. RTA 3265-3270. Robert Holley also
18 attested to when petitioner violently attacked him and stole his
19 personal belongings. RTA 3271-78. Lastly, Dennis Ribble testified
20 that petitioner told him that he had robbed a liquor store, and
21 shot a man with a gun and kept the body in the car for three days.

22
23

¹⁴ The record establishes that the prosecutor was prepared to
24 present detailed evidence in aggravation about petitioner's conduct
25 relative to the 1972 robbery, and about a violent incident in
26 Burlingame in 1978. The state agreed not to present this
particularized evidence only in order to avoid a continuance of the
penalty phase, as Mr. Christiansen admitted that he had not
prepared to rebut this evidence.

1 RT 3299-3301.

2 As Mr. Christiansen has confessed, he had not investigated
3 petitioner's prior criminal history and sought a continuance of the
4 penalty phase in order to rebut the state's offer of proof. Had
5 he prepared, he would have learned that petitioner was unarmed in
6 the 1968 robbery, and that his participation was limited to driving
7 the get-away vehicle. Pet. Exh. Nos. 27 & 30. He also would have
8 learned that petitioner was a productive prisoner who adjusted well
9 to prison life and posed no disciplinary concerns to the
10 corrections staff. Further investigation may have allowed him to
11 challenge the state's witnesses to the unproven criminal incidents.
12 If this investigation had been conducted, the jury could have heard
13 possibly mitigating evidence to clarify or offset the apparent
14 frequency of his violent criminal behavior.

15 Instead, the record is devoid of any such evidence. Indeed,
16 counsel's poor preparation actually added to the evidence already
17 in aggravation, when he allowed Hazel Deacon to testify to a
18 previously undisclosed plan petitioner had to rob a bank. RTA 3303-
19 3305.

20 Thus, in closing argument the state was able to summarize all
21 of this evidence and deliver an illustration of a man who engaged
22 in criminal activity with regularity. The prosecutor argued:

23 Twice in 1968 and 1972 sentenced to state prison, armed
24 robbery. Punctuated by this case, September 12 and
13th, 1978. September 14, 1978, armed robbery, San
Mateo. Hazel Deacon told you something else yesterday.
25
26

1 In October or so, '78, Mr. Ainsworth was in San
2 Francisco there with a gun talking about pulling a bank
3 robbery. Again, threatening this type of violent
4 criminal activity.

5 We then skip to April 1979, April 29th, and we have Mr.
6 Ainsworth, just senselessly, that's the only way you can
7 describe it, senselessly attacking Mr. Holley, who for
8 all he believed was there having a beer with a friend,
9 the next thing he knew he was knocked down and Mr.
10 Ainsworth and his wife were stealing his material
11 possessions. A good friend, just knocking him down and
12 looting him.

13 RTA 3315-16. The prosecutor identified the sum of this evidence
14 as a factor in aggravation. RTA 3316.

15 In contrast, Mr. Christiansen merely suggested that even if
16 petitioner was "not a nice person," his life still had value. RTA
17 3325.

18 c. Mental or Emotional Disturbance

19 Also important to the consideration was "[w]hether or not the
20 offense was committed while the defendant was under the influence
21 of extreme mental or emotional disturbance." Cal. Penal Code
22 § 190.3(c). The prosecutor argued to the jury that petitioner was
23 not under the influence of extreme mental or emotional disturbance,
24 was not crazy, was not under work pressure but committed the crime
25 "because of a desire to steal, to kidnap, to rape and to kill."
26 RTA 3316. The prosecutor identified this desire as a factor in
 aggravation. RTA 3316.

27 Had petitioner's counsel conducted an adequate investigation
28 into his client's military, health and prison records, he would
29 have found documentation that petitioner had been diagnosed as
30 suffering from several mental illnesses, and was addicted to

1 alcohol and other drugs. Counsel would have learned that many of
2 petitioner's relatives suffered from severe mental illness and
3 suicidal ideation. Counsel would have learned that petitioner's
4 history suggested that his criminal activity was related to
5 satisfying his substance addictions. This evidence could have been
6 offered in mitigation to explain petitioner's state of mind. But
7 it was not offered, much less investigated.

8 Similarly, in closing argument, counsel could have asked the
9 jury to recall the testimony of petitioner's co-defendant, Donald
10 Bayles, who claimed that the two had each consumed up to five beers
11 the morning before abducting Nancy Huynh, and that they repeatedly
12 purchased and consumed six-packs of beer over the course of the
13 next twenty-four hours as they drove Huynh around Northern
14 California. This evidence could have been offered to mitigate
15 petitioner's presence of mind during the ordeal.

16 d. Victim's Participation

17 The factfinder was also to consider "[w]hether or not the
18 victim was a participant in the defendant's homicidal conduct or
19 consented to the homicidal act." Cal. Penal Code § 190.3(d). The
20 prosecutor opined: "It is hard to conceive of a more innocent
21 victim than Nancy Huynh, who on September 12th, 1978, was just
22 trying to lead her life like the rest of us There is no
23 mitigation in the conduct of the victim in this case." RTA 3316-
24 17.

25 Petitioner's counsel offered no evidence or argument relating
26 to this factor.

1 e. Justification or Extenuation

2 Also germane to the sentencing determination was "[w]hether
3 or not the offense was committed under circumstances which the
4 defendant reasonably believed to be a moral justification or
5 extenuation for his conduct." Cal. Penal Code § 190.3(e). The
6 prosecutor referred the jury to the evidence underlying the
7 conviction, condemning petitioner because he had "played God with
8 Nancy Huynh's life, that is an immoral justification of him for his
9 conduct." RTA 3317.

10 Petitioner's counsel offered no evidence or argument relating
11 to this factor.

12 f. Duress or Domination

13 The sentencer was also asked to weigh whether or not defendant
14 "acted under extreme duress or under the substantial domination of
15 another person." Cal. Penal Code § 190.3(f). The prosecutor
16 argued,

17 There is no question who was in charge from the moment
18 that car left the parking lot until it found its final
19 resting place on the cliffs above Pacifica. There is no
20 question Mr. Ainsworth was not forced by anybody or
21 anything to do anything except exercise his own free
22 will. That aggravates the crime.

23 RTA 3317.

24 Given that petitioner's co-defendant testified at the guilt
25 phase, Mr. Christiansen had an opportunity in his cross-examination
26 to adduce testimony attacking the co-defendant's credibility in
27 casting the blame upon petitioner. However, Mr. Christiansen did
28 not do so.

1 g. Mental Capacity

2 The court also instructed the jury to consider "[w]hether or
3 not at the time of the offense the capacity of the defendant to
4 appreciate the criminality of his conduct or to conform his conduct
5 to the requirements of law was impaired as a result of mental
6 disease or defect, or the affects of intoxication." Cal. Penal
7 Code § 190.3(g). The prosecutor again recalled the facts of the
8 case, and argued that because petitioner had consumed "at most a
9 few beers . . . he appreciated the criminality of his conduct and
10 chose not to conform it." RTA 3318. In fact, the evidence
11 suggested that over the twenty-four hour period preceding Huynh's
12 death, petitioner had consumed perhaps twelve or more beers and,
13 in any event, was an alcoholic. Mr. Christiansen failed to refute
14 the way the state minimized petitioner's intoxication, thus
15 depriving petitioner of potentially mitigating evidence.

16 h. Age

17 "The age of the defendant at the time of the crime" was an
18 added factor to consider. Cal. Penal Code § 190.3(h). Noting that
19 petitioner's sister had attested to his age, the prosecutor opined
20 that because petitioner was an full grown adult, that was a factor
21 in aggravation.

22 i. Role as Accomplice

23 An additional guiding factor was "[w]hether or not the
24 defendant was an accomplice to the offense and his participation
25 in the commission of the offense was relatively minor." Cal. Penal
26 Code § 190.3(i). As to this factor, the prosecutor reminded the

1 jury that their verdict established that "Mr. Ainsworth was the
2 heavy in this crime." RTA 3318.¹⁵ Mr. Christiansen could have
3 opened this to debate by attacking Bayles' vague and inconsistent
4 trial testimony. RTA 2569-2841.¹⁶ Instead, Mr. Christiansen
5 adduced no evidence and argued nothing to counter the state's
6 portrait of petitioner's role in the crime.

7 **j. Other Extenuating Reasons**

8 Lastly, the sentencer was to consider any other circumstance
9 which extenuates the gravity of the crime even though if not a
10 legal excuse for the crime. Cal. Penal Code § 190.3(j). The
11 prosecutor again focused in great detail on the manner in which
12 Huynh was killed, suggesting that the immorality of the killing
13 obliterated any other excuse which could be offered as an
14 extenuating circumstance. RTA 3320-21. Petitioner's counsel did
15 not speak to this factor.

16 **2. Analysis**

17 As to each of the enumerated factors, petitioner is
18 constitutionally entitled to have the jury hear any available
19 evidence in mitigation. Skipper v. South Carolina, 476 U.S. 1
20 (1986) and Lockett v. Ohio, 438 U.S. 586, 608 (1978). The details
21 of the post-trial investigation summarized above establish that
22

23 ¹⁵ Petitioner's co-defendant was sentenced to eight years
24 imprisonment for second-degree murder.

25 ¹⁶ Bayle's testimony during the guilt phase was largely
26 incoherent and riddled with inconsistencies. The one thing that
his testimony made clear is that Bayles was too intoxicated during
the long ordeal to remember much of anything that occurred.

1 counsel's failure to adequately investigate petitioner's background
2 prevented him from either presenting any detailed mitigating
3 evidence on petitioner's behalf, or strategically deciding not to
4 do so.

5 In addition, counsel also failed to present the little
6 mitigating that he did have, again without any evidence that the
7 omission was due to a tactical choice. In support of petitioner's
8 motion for a new trial based on ineffective assistance of counsel,
9 Mr. Christiansen conceded that he omitted testimony relating to a
10 phone call petitioner made to the District Attorney's office when
11 he learned there was a warrant for his arrest in connection with
12 Huynh's murder. RTA 3349. Thus, he failed to introduce possible
13 mitigating evidence of petitioner's acceptance of responsibility.

14 To be sure, it is difficult for a court to predict whether the
15 jury would have construed certain evidence if presented as
16 mitigating or aggravating. See Tuilaepa v. California, 512 U.S.
17 967, 976 (1994) (evidence of age may be considered in mitigation or
18 aggravation, depending on the circumstances); Harris v. Pulley, 885
19 F.2d 1354, 1380-83 (9th Cir. 1988) (same for personality disorder).
20 The court's own judgment about what is mitigating and what is
21 aggravating in a particular case may be different than the jury's
22 view. Tuilaepa, 512 U.S. at 976.

23 Nonetheless, the penalty of death cannot be imposed without
24 an individualized sentencing determination, which is satisfied only
25 when the factfinder can consider all potentially mitigating
26 evidence. Blystone v. Pennsylvania, 494 U.S. 299, 307 (1990).

1 Thus, while it may be difficult for a judge to conclude that an
2 outcome of a death penalty proceeding in a standardless,
3 nonweighing state would have been different if counsel had
4 presented available evidence in mitigation, see Williams v.
5 Calderon, 52 F.3d 1465, 1479 (9th Cir. 1995), prejudice is still
6 established where the court's confidence in the outcome of the
7 sentencing is sufficiently shaken because all mitigating evidence
8 was not adduced. Baylor v. Estelle, 94 F.3d 1321, 1324 (9th Cir.
9 1996). See also Hendricks v. Calderon, 70 F.3d 1032, 1043-44 (9th
10 Cir. 1995) ("the Constitution prohibits the imposition of the death
11 penalty without adequate consideration of factors which might evoke
12 mercy").

13 Here, potentially mitigating evidence developed by post-
14 conviction counsel regarding petitioner's family and social
15 background that was available to trial counsel had he looked is
16 both substantial and significant. Prejudice is established where
17 "the family portrait painted at the federal habeas hearing was far
18 different from the unfocused snapshot handed the superior court
19 jury." See Bean v. Calderon, 163 F.3d at 1079-80 (9th Cir. 1998)
20 (finding prejudice where the state court jury had no knowledge of
21 the emotional and physical treatment the defendant suffered as a
22 child).

23 Moreover, counsel's failure during closing argument to focus
24 the jury on the worth of the life of Stephen King Ainsworth was
25 inexcusable. Clabourne, 64 F.3d at 1386-87 (perfunctory argument
26 based on weak evidence contributed to prejudice of penalty phase).

1 This is not a case where the presentation of the mitigating
2 evidence would have been cumulative of evidence already before the
3 court. Cf. Babbitt v. Calderon, 151 F.3d 1170, 1176 (9th Cir.
4 1998). Other than insubstantial testimony provided by Carol and
5 Sherry Donsing, Hazel Deacon, and Coleen Yoho, the jury knew
6 nothing about petitioner's history or his circumstances. To the
7 contrary, the weight of the evidence omitted was so substantial
8 compared to that actually presented during the penalty phase
9 defense, that it is reasonably likely that the outcome of the
10 proceedings may have been different.

11 Christiansen's representation at the sentencing hearing
12 "amounted in every respect to no representation at all." Blake v.
13 Kemp, 758 F.2d 523, 533 (11th Cir. 1985) (quoted in Clabourne v.
14 Lewis, 64 F.3d 1373, 1387 (9th Cir. 1995)). When counsel's
15 inadequate performance renders the result of the trial unreliable
16 or the proceeding fundamentally unfair, the prejudice standard is
17 satisfied. Lockhart v. Fretwell, 506 U.S. 364, 372 (1993). Given
18 all of the above, I find that due to trial counsel's failure to
19 investigate and present any meaningful mitigating evidence on
20 petitioner's behalf, even without his blundering contribution to
21 the aggravating evidence, there is a reasonable probability that
22 the jury would have imposed a sentence other than death.

23 Because counsel's defense of petitioner on the penalty phase
24 was constitutionally deficient, and because his inadequacy
25 prejudiced the outcome of petitioner's sentencing, I must grant
26 petitioner's habeas petition on his claim of ineffective assistance

1 of counsel.

2 IV.

3 **CLAIM S - DENIAL OF CONTINUANCE TO INVESTIGATE**

4 At commencement of the penalty selection phase of his trial
5 on January 4, 1980, the state was prepared to offer evidence of two
6 prior convictions and three uncharged offenses as follows:

7 1. A conviction for armed robbery in Sacramento County in
8 January 1968;
9 2. A conviction for armed robbery of a pharmacy in Yuba
County in October 1972;
10 3. An uncharged assault and battery in Burlingame, San
Mateo County, in June 1978;
11 4. An uncharged armed robbery in San Mateo in September
1978; and
12 5. An uncharged robbery incident in San Francisco in May
1979.

13 Penal Code § 190.3 gave notice that the state might use
14 petitioner's prior crimes to support imposition of the death
15 sentence. Furthermore, on October 19, 1979, prior to trial, the
16 state gave written notice of its intent to offer this specific
17 evidence.

18 At the commencement of trial, petitioner admitted the fact of
19 the 1968 and 1972 robbery convictions. He possessed the police
20 reports about the September 1978 and May 1979 uncharged robberies
21 but claimed that he had not been able to obtain the reports of the
22 earlier crimes. RTA 3245. On January 3, 1980, just prior to the
23 penalty phase, the state furnished to petitioner's counsel copies
24 of the police reports about the 1968 and 1972 robbery convictions
25 and June 1978 assault. On January 4, petitioner sought a 30-day
26 continuance. RTA 3246. Petitioner's counsel claimed he needed the

1 time to prepare a defense based upon an investigation of
2 petitioner's role in the offenses. RTA 3247-48.

3 To avoid the requested continuance, the state agreed to limit
4 its proof of the first matters to the fact of the 1968 conviction
5 evidenced by a certified copy of the verdict finding petitioner
6 guilty of first degree robbery without mention of whether he was
7 actually armed. RTA 3248-49. The prosecutor admitted he did not
8 know petitioner's role in the 1968 armed robbery and said it was
9 possible that petitioner drove the getaway car or was involved in
10 some other way short of being the actual triggerman. RTA 3248.
11 Unsatisfied, petitioner's counsel argued that he need time to
12 investigate perhaps to show that petitioner's role was minor. RTA
13 3251. In response, the prosecutor said that his witnesses were
14 present and that petitioner's counsel might talk with them to
15 settle the question. RTA 3251.

16 The victim of the armed robbery in Yuba City in 1972 was also
17 present to testify that petitioner hit him in the face with a
18 shotgun and kicked him in the head. RTA 3251. One of the
19 bystanders whose vehicle petitioner sought to hijack was also
20 present to testify. RTA 3252. The state also was in touch with
21 a Burlingame resident who witnessed the alleged assault in June
22 1978. RTA 3252.

23 The court suggested petitioner might have a one-week
24 continuance to interview the state's witnesses. RTA 3253. However,
25 to avoid a continuance, the prosecutor offered to limit his proof
26 to the verdict on the 1968 robbery charge and petitioner's plea of

1 guilty to the 1972 robbery and to drop the charge concerning the
2 1978 assault and battery in Burlingame and to offer his witnesses
3 to petitioner's counsel to decide whether counsel wished to delve
4 behind the convictions. RTA 3254-55. The court thus denied the
5 requested continuance upon the conditions offered by the state.
6 RTA 3256.

7 Petitioner claims that the order denying the requested
8 continuance denied him due process of law. Had the requested
9 continuance been granted, petitioner argues, he would have been
10 able to establish that petitioner was convicted in 1968 as an aider
11 and abetter who either waited outside and drove the getaway car,
12 or provided the car and gun to the actual robber. Further,
13 petitioner argues, the delay would have allowed him to prove either
14 that his 1972 guilty plea was not knowing and voluntary and to
15 prevent its consideration by the jury, or that the weapon he used
16 as a club was not loaded, and that petitioner was under the
17 influence of drugs and the robbery was committed on the spur of the
18 moment to obtain drugs "with the taking of money only an
19 afterthought."

20 The federal due process clause guarantees against arbitrary
21 and fundamentally unfair government conduct. See Wolff v.
22 McDonnell, 418 U.S. 539, 558 (1974) (citing Dent v. West Virginia,
23 129 U.S. 114, 123 (1889)); Spencer v. Texas, 385 U.S. 554, 563-64
24 (1967). To show denial of due process by refusal to grant a
25 request by counsel for a continuance to prepare a defense,
26 petitioner must show that the denial deprived him of the effective

1 assistance of counsel. See Unger v. Sarafite, 376 U.S. 575 (1964);
2 White v. Ragan, 324 U.S. 760, 764 (1945).

3 Petitioner's counsel had notice of the state's intent to use
4 the 1968 and 1972 convictions since October 19, 1979, prior to
5 trial. Most of the "defense" to these convictions that petitioner
6 now proffers was within petitioner's knowledge, and some of it was
7 uniquely within petitioner's knowledge. No continuance was
8 necessary to attempt to show that petitioner's 1972 guilty plea was
9 infirm, or to show his state of mind at the time of the 1972
10 robbery, as petitioner himself was the only source of such
11 evidence.¹⁷ The state's delivery of the police reports on the eve
12 of the penalty selection phase of the trial, which provoked the
13 request for continuance, is not relevant to counsel's failure to
14 investigate and prepare prior to the eve of the penalty phase. Put
15 another way, it was not the denial of the continuance that deprived
16 petitioner of effective assistance of counsel.

17 Furthermore, even assuming that armed with tardy police
18 reports and additional time petitioner might have been able to make
19 the demonstration he now relies upon, denial of the requested
20 continuance did not prejudice petitioner. Had the continuance been
21 granted, the state would have undoubtedly introduced specific
22 evidence regarding petitioner's violent role in the prior criminal
23 incidents in rebuttal to petitioner's effort to minimize his prior
24

25 ¹⁷ The factual basis for petitioner's contention that his
26 1972 guilty plea was invalid is set forth below in the discussion
of his Claim T.

1 conduct. In light of the denial, the penultimate facts underlying
2 the 1968 and 1972 convictions dropped out of the case entirely.
3 The jury heard no evidence that petitioner attempted to hijack a
4 car to make good an escape from the 1968 robbery scene. The jury
5 did not hear the victim of the 1972 robbery testify that petitioner
6 hit him in the head with a shotgun used as a club, loaded or
7 unloaded, and then kicked him in the head.¹⁸ Additionally, the
8 state's evidence of an uncharged assault and battery in Burlingame
9 in June 1978 dropped out. Because of the restrictions of proof
10 imposed upon the prosecutor as a condition to denial of the
11 request, it is not at all clear that the jury would have had a
12 better view of petitioner had the continuance been granted.
13 Rather, the prosecution may have been able to adduce additional
14 aggravating evidence. Thus, the denial of petitioner's request for
15 a continuance to prepare his defense to the two prior convictions
16 did not violate his due process, and claim S will be denied.

v.

CLAIM T -- USE OF INVALID PRIOR CONVICTION

19 Petitioner contends that his 1972 armed robbery conviction was
20 invalid because he was not advised of his constitutional rights
21 before waiving them by pleading guilty pursuant to a plea bargain
22 requiring the state to drop a charge of a prior robbery that may
23 have later exposed petitioner to prosecution as an habitual
24 offender. Petitioner claims that use of an invalid prior

1 conviction violated his Fifth, Sixth, Eighth and Fourteenth
2 Amendment rights.

3 This claim stands on petitioner's March 1989 affidavit that
4 he pleaded guilty in exchange for the state's agreement to drop an
5 allegation of a prior robbery conviction (which immunized
6 petitioner against a subsequent prosecution as an habitual
7 offender), without advice by the judge, district attorney or
8 counsel that he had a right to a jury trial, the right to confront
9 and cross-examine witnesses and the privilege not to be compelled
10 to incriminate himself. Petitioner does not claim that he did not
11 know he had these rights but rather that no one reminded him, and
12 that the benefit of the plea bargain was so very attractive that
13 the fact that he was waiving these rights was not on his mind.
14 Pet. Exh. No. 60.

15 At the relevant time, California Penal Code § 667.5 provided
16 for enhancement of prison terms for new offenses because of prior
17 prison terms. The information filed July 5, 1979, charged both the
18 1968 and 1972 convictions. CT 210-211. Before opening statements
19 petitioner admitted the two convictions "subject to any
20 constitutional arguments that might be advanced at the time of
21 judgment and sentencing." RTA 1652. The trial court stated the
22 admission slightly differently - that petitioner "admit[ted] the
23 two alleged prior convictions reserving [his] right to raise the
24 question as to the constitutionality of either or both of those
25 convictions." RTA 1652.

26 ////

1 Under California law, a constitutionally invalid prior
2 conviction cannot be used to enhance punishment, see People v.
3 Coffey, 67 Cal.2d 204, 215 (1967), if a defendant denies prior
4 convictions charged to enhance sentence, the issue must be tried
5 and the prosecution must prove beyond a reasonable doubt each
6 element, i.e., that defendant was convicted, that the conviction
7 was for a felony, and that defendant served a term of imprisonment.
8 See People v. Morrison, 26 Cal.App.2d 616 (1938). However, if the
9 defendant, as here, admits the prior convictions, the charge must
10 not be read to the jury nor alluded to in the trial. Cal. Penal
11 Code §§ 1025, 1093(a); see also CT 211. Thus, by admitting the
12 priors while preserving the right to argue constitutional
13 impediments to their use, so long as petitioner did not testify and
14 subject himself to impeachment by proof of the prior felony
15 convictions, see Cal. Evid. Code § 788, the jury trying him for
16 murder during a robbery would never hear of the two prior robbery
17 convictions - legal arguments about the constitutionality of the
18 convictions or their use would be made only to the trial judge
19 after guilt or innocence was decided by the jury.

20 When the jury returned a verdict of guilty of capital murder,
21 use of the prior convictions to enhance the punishment for a
22 lesser-included offense became moot, but the admitted prior
23 convictions took on new significance pursuant to Penal Code § 190.3
24 as factors properly considered in choosing between life
25 imprisonment or death again so long as not tainted by
26 unconstitutionality.

1 Although petitioner preserved his entitlement to assert
2 constitutional challenges to both the 1968 and 1972 prior robbery
3 convictions, counsel relinquished the opportunity by failing to
4 adequately prepare to argue the validity of the 1972 conviction.¹⁹
5 The reasonable inference is that trial counsel, either
6 strategically or negligently, waived the opportunity to assert a
7 constitutional challenge to the 1972 conviction.

8 Even if the waiver was due to the inadequate performance of
9 counsel, the 1972 conviction does not appear to be
10 unconstitutional. In Boykin v. Alabama, 395 U.S. 238 (1979), the
11 Supreme Court held that a constitutionally valid guilty plea
12 depends upon a record that defendant knowingly and voluntarily
13 waived his right to jury trial, confrontation and privilege against
14 self-incrimination. In Parke v. Raley, 506 U.S. 20 (1992), the
15 Court held that the Boykin ban against presuming waiver from a
16 silent record does not apply on habeas corpus if the defendant did
17 not appeal the conviction; rather, a prior final conviction is
18 entitled to a presumption of correctness. Thus, petitioner here
19 has a burden of adducing evidence that the 1972 conviction was
20 invalid.

21
22 ¹⁹ Even if petitioner then successfully raised his challenge
23 to his 1972 guilty plea, the jury would have heard the more damning
24 facts underlying the conviction. The state was prepared to adduce
25 the evidence of the robbery victim who would have testified that
26 petitioner hit him in the face with a shotgun and kicked him in the
head. RTA 3251. One of the bystanders whose vehicle petitioner
sought to hijack was also present to testify. RTA 3252. This
evidence would likely have cast petitioner in a light worse than
simply reading a jury verdict of guilt of first degree robbery.

1 The only evidence in support of petitioner's claim is his own
2 affidavit made on death row in 1989 that neither the judge,
3 prosecutor or his own counsel reminded him of the rights he
4 exercised in 1968 when he pleaded guilty in 1972 pursuant to a plea
5 bargain that petitioner believed immunized him from a future
6 habitual criminal prosecution. Because petitioner had counsel in
7 1972, his claim is properly analyzed under the Sixth Amendment
8 guarantee of effective assistance of counsel. Under this analysis,
9 petitioner must prove that his counsel was incompetent and that but
10 for the denial of effective assistance, petitioner was
11 prejudiced because he would not otherwise have pleaded guilty.
12 Hill v. Lockhart, 474 U.S. 52 (1985). Petitioner has demonstrated
13 neither that his counsel for the 1972 conviction was inadequate,
14 nor that he would not have pleaded guilty in 1972 had he been
15 explicitly advised about the constitutional rights he waived by
16 pleading guilty. Accordingly, Claim T will be denied for lack of
17 proof of the invalidity of the prior conviction.

VI.

CLAIM U - OTHER CRIMES INSTRUCTIONS

At the time of petitioner's penalty phase, California Penal Code § 190.3 provided that in determining whether the penalty was to be death or life imprisonment without possibility of parole, the trier of fact must take into account, among other things, "the presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence." Cal. Penal

1 Code § 190.3 (b) .

2 Petitioner claims that the prosecutor failed to specify what
3 specific evidence it adduced pursuant to this provision; that the
4 trial court erred in failing to instruct that, properly to be
5 considered, each aggravating circumstance must constitute a
6 criminal offense; that the state must prove the corpus delicti
7 apart from petitioner's admission; and that the matters must be
8 proved beyond a reasonable doubt.²⁰

9 The Eighth Amendment requires adherence to two basic steps in
10 the capital decisionmaking process: an "eligibility" decision and
11 a "selection" decision. To be eligible for the death penalty, the
12 defendant must be convicted of a crime for which the death penalty
13 is a proportionate punishment. Coker v. Georgia, 433 U.S. 584
14 (1977). The defendant is constitutionally "eligible" for the death
15 sentence if the trier of fact convicts him of murder and finds an
16 aggravating or special circumstance. Lowenfield v. Phelps, 484
17 U.S. 231 (1988); Zant v. Stephens, 462 U.S. 862 (1983). The
18 aggravating circumstance must be free of vagueness and must
19 rationally narrow the broad class of murderers to a smaller group
20 eligible for the death sentence. Godfrey v. Georgia, 446 U.S. 420,
21 428 (1980). All of these federal constitutional requirements were
22 satisfied in this case.

23 ////

24
25 ²⁰ In People v. Robertson, 33 Cal.3d 21 (1982), the
26 California Supreme Court held that such an instruction is required
under state law because such evidence may have a particularly
damaging impact on the selection decision.

1 At the selection stage the judge or jury determines whether
2 an eligible defendant should in fact suffer the death penalty.
3 During the penalty phase, the Constitution requires only a
4 principled "individualized determination on the basis of the
5 character of the individual and the circumstances of the crime."
6 Zant, supra, at 879. Selection factors also must not be "too
7 vague." Id. In Tuilaepa v. California, 512 U.S. 967 (1994), the
8 Supreme Court found that "prior criminal activity" is not an
9 unconstitutionally vague selection factor. The Court explained
10 that:

11 "Factor (b) is phrased in conventional and
12 understandable terms and rests in large part on a
13 determination whether certain events occurred, thus
14 asking the jury to consider matters of historical fact.
15 Under other sentencing schemes, in Texas for example,
16 jurors may be asked to make a predictive judgment, such
17 as "whether there is a probability that the defendant
would commit criminal acts of violence that would
constitute a continuing threat to society." . . . Both
backward-looking and a forward-looking inquiry are a
permissible part of the sentencing process, however, and
the States have considerable latitude in determining how
to guide the sentencer's decision in this respect."

18 Tuilaepa, 512 U.S. at 976-977.

19 A principled individualized sentencing hearing is one in which
20 due process guarantees are respected, assistance of counsel is
21 provided, and defendant is accorded a right of allocution. Clemons
22 v. Mississippi, 494 U.S. 738 (1990) (due process); Mempa v. Rhay,
23 389 U.S. 128, 88 S.Ct. 254 (1967) (assistance of counsel); Estelle
24 v. Boardman, 957 F.2d 1523 (9th Cir.), cert. denied, 506 U.S. 904
25 (1992) (allocution). If, as the Court held in Tuilaepa, predictive
26 evidence of future criminal activity at the selection hearing is

1 permissible then it is clear that the Constitution does not require
2 the other procedural protections upon which petitioner bases this
3 claim. No authority cited asserts that the Eighth Amendment
4 commands procedural and evidentiary rules, such as notice of
5 evidence and burdens of proof, during the penalty phase.

6 Unless a specific federal constitutional guarantee is
7 implicated, the federal inquiry is limited to whether claimed
8 errors so infected the trial with unfairness as to deprive the
9 defendant of due process. Romano v. Oklahoma, 114 S.Ct. 2004, 2012
10 (1994). Contrary to petitioner's assertion, the Constitution does
11 not require the prosecutor to specify which specific evidence of
12 past criminal activity it adduced pursuant to factor (b), to
13 establish that each alleged activity constitutes a criminal
14 offense, or to prove beyond a reasonable doubt the corpus delicti
15 apart from petitioner's admission. See, e.g., Pulley v. Harris,
16 465 U.S. 37, 41 n. 4 (1984) (noting without disapproval appellate
17 court's holding that factors required for selecting death sentence
18 need not be found beyond a reasonable doubt); Walton v. Arizona,
19 497 U.S. 639 (1990) (sentencing decision need not be made by a
20 jury); Campbell v. Kinscheloe, 829 F.2d 1453, 1461 (9th Cir. 1987)
21 (holding that unadjudicated criminal activity may be used to show
22 future dangerousness, and implying that past criminal activity may
23 be proved without the procedural protections required to adjudicate
24 criminal liability); Williams v. Calderon, 52 F.3d 1465, 1480-1481
25 (9th Cir. 1995) (requirement that criminal activity be proved beyond
26 a reasonable doubt is state law error, not cognizable on federal

1 habeas); but see Deco v. Lashley, 507 U.S. 272 (1993) (evading
2 question of entitlement to presumption of innocence of
3 unadjudicated crimes considered as aggravating factors). Because
4 petitioner is not entitled to the procedures he identified, this
5 claim is without merit.

6 **VII.**

7 **CLAIM V -- USE OF ABSENCE OF MITIGATION AS AGGRAVATION**

8 Petitioner claims that the prosecutor's argument that the
9 absence of four statutory mitigating factors constituted an
10 aggravating factor deprived him of due process.

11 After speaking briefly about petitioner's criminal history
12 (RTA 3315:26-3316:14), the prosecutor argued:

13 We look next at whether or not the offense here was
14 committed while the defendant was under the influence of
15 extreme mental or emotional disturbance. Was he crazy?
16 Was he under a lot of pressure because of a job? Was he
17 trying to feed his family? Is that why this type of
crime was committed? Again, the answer absolutely not.
This crime was committed because of a desire to steal,
to kidnap, to rape and to kill. Was not caused by any
emotional disturbance or mental disturbance.

18 Again, we total that one up. It is a factor in
19 aggravation.

20 We ask next whether the victim, whether or not the
21 victim was a participant in the defendant's homicidal
22 conduct or consented to the homicidal act. It is hard
23 to conceive of a more innocent victim . . . who on
September 12th, 1978, was just trying to lead her life
like the rest of us, just taking one step at a time,
trying to go to work, had plans to buy a house, had a
young son and husband, just trying to lead her life and
just totally to her surprise she is snatched off the
face of this earth, totally innocent victim. Again,
absolute aggravation.

24 There is no mitigation in the conduct of the victim in
25 this case.

1 The next factor, whether or nor the offense was
2 committed under circumstances which the defendant
3 reasonably believed to be moral justification or
4 extenuation for his conduct.

5 I hardly need to answer this for you. You sat through
6 this case, heard about the decision Mr. Ainsworth
7 pondered, whether he should allow [the victim] to live,
8 to get medical help so she should live, and thus risk
9 his freedom or whether he should regard his life and his
10 freedom as superior to her right to live. He played God
11 with [the victim's] life, that is an immoral
12 justification of him for his conduct.

13 The next factor, whether or not the defendant acted
14 under extreme duress or under the substantial domination
15 of another person.

16 There is no question who was in charge from the moment
17 that car left the parking lot until it found its final
18 resting place on the cliffs above Pacifica.

19 There is no question Mr. Ainsworth was not forced by
20 anybody or anything to do anything except exercise his
21 own free will. That aggravates the crime.

22 Next, we ask whether or not at the time of the offense
23 the capacity of the defendant to appreciate the
24 criminality of his conduct or to conform his conduct to
25 the requirements of law was impaired as the result of
26 mental disease or the effects of intoxication.

27 At most we have a few beers consumed during this spree,
28 during the entire time though Mr. Ainsworth is doing his
29 level best to avoid apprehension, to hide the body, to
30 hide the car, to dispose of the evidence.

31 He certainly knew what the requirements of the law were.
32 He certainly appreciated the criminality of his conduct.

33 We're not dealing here with a babe who is wet behind the
34 ears. He knew what he was doing and he knew what he was
35 doing was wrong, but chose to do it anyway. He
36 appreciated the criminality of his conduct and chose not
37 to conform it.

38 The next factor the law provides the age of the
39 defendant at the time of the crime. Mr. Ainsworth, as
40 his sister testified I believe, is thirty-five years
41 old. We go back fourteen months, he's either thirty-
42 three or thirty-four. We're not dealing with an

1 eighteen-year old, a nineteen year old who just doesn't
2 know any better and for lack of maturity did a senseless
3 act. We're dealing with a full grown adult here.
4 Again, a factor in aggravation.

5 The next factor whether or not the defendant was an
6 accomplice to the offense and his participation in the
7 commission of the offense was relatively minor.

8 Your verdict has already answered that particular
9 question, was Mr. Ainsworth the heavy in this crime.

10 Finally, we get to the catch-all factor, is there any
11 other circumstance which extenuates the gravity of this
12 crime, even though it is not a legal excuse for the
13 crime?

14 Can you think of anything in the world that even said to
15 you in the slightest manner at all, well, it's okay what
16 he did, that's what that is, some type of excuse for
17 what he did. Not even the most fertile imagination can
18 conjure up an acceptable rationale for his conduct.

19 RTA 3316:15-3319:6.

20 On petitioner's state court appeal, the California Supreme
21 Court found that argument characterizing the absence of mitigating
22 evidence as aggravating violated the spirit if not the letter of
23 the Court's much later decisions in People v. Davenport, 41 Cal.3d
24 247 (1985) and People v. Rodriguez, 42 Cal.3d 730 (1986), but that
25 petitioner was not prejudiced. Ainsworth, 45 Cal.3d at 1034.

26 In Tuilaepa, for instance, petitioner contended that
27 consideration of "the age of the defendant at the time of the
28 crime" was equivocal because the prosecution typically argues in
29 favor of the death penalty based on the defendant's age, no matter
30 how old or young he was at the time of the crime. The Court found
31 no constitutional deficiency in this factor because "[b]oth the
32 prosecution and the defense may present valid arguments as to the

1 significance of the defendant's age in a particular case.
2 Competing arguments by adversary parties bring perspective to a
3 problem, thus serve to permit a more reasoned decision, providing
4 guidance as to a factor jurors most likely would discuss in any
5 event." Tuilaepa, 512 U.S. at 975. In other words, petitioner's
6 age at the time of the crime could be argued as mitigating or
7 aggravating.

8 But as the California Supreme Court recognized in Davenport,
9 several of the statutory "mitigating" factors are particularly
10 unlikely to be found in most cases, e.g., factor (e) (whether or
11 not the victim was a participant in the homicidal conduct or
12 consented to it) and factor (f) (whether or not the offense was
13 committed under circumstances that the defendant reasonably
14 believed to be a moral justification or extenuation for his
15 conduct). To allow the absence of these factors to be construed
16 and argued as "aggravating" circumstances would mean that there
17 were aggravating circumstances in almost every capital murder. It
18 would also tend to confuse the meaning of the terms "aggravating"
19 and "mitigating." An aggravating factor is a circumstance beyond
20 the elements of the underlying crime that increases the
21 justification for a more serious penalty than would otherwise be
22 imposed. Zant v. Stephens, 462 U.S. 862, 876 (1983). A mitigating
23 factor is one that though not an excuse or justification for the
24 crime, may be considered as extenuating or reducing the defendant's
25 moral culpability. Boyd v. California, 494 U.S. 370, 375 n.2
26 (1990) (citing People v. Easley, 34 Cal.3d 858 (1983)).

1 Thus the absence of mitigation does not necessarily render a
2 crime more offensive. Davenport, 41 Cal.3d at 289. Accordingly,
3 the California Supreme Court forbade the state from arguing that
4 the absence of mitigation evidence was an aggravating circumstance.
5 Id. But in Ainsworth the Court found that this same error was
6 harmless

7 "in view of the overwhelming 'other crimes' evidence.
8 The evidence of two armed robbery convictions and two
9 additional violent robberies must have been crucial in
10 the determination whether the death penalty was
11 appropriate for the defendant, certainly more crucial
12 than the fact that defendant was 'not crazy,' not 'in
13 charge,' and was in his middle 30's. In sum, these
14 considerations compel a conclusion that the prosecutor's
15 comments could not have been prejudicial under any
16 applicable standard."

17 People v. Ainsworth, 45 Cal.3d 984, 1034-35 (1988).

18 Petitioner argues, on the basis of the reasoning of Davenport,
19 that he was denied due process of law because by allowing the state
20 to argue that the absence of mitigating circumstances constituted
21 aggravating circumstances, the state was relieved of its burden of
22 adducing evidence of one or more aggravating circumstances at the
23 penalty selection phase. Although Tuilaepa forecloses
24 consideration of a federal claim based upon the reasoning of
25 Davenport, see Tuilaepa 512 U.S. at 977, petitioner's argument also
rests upon the Supreme Court's decision in Walton v. Arizona, 497
U.S. 639 (1990). There, an Arizona statute requiring the trial
judge to sentence a capital defendant to death if the court found
one or more aggravating circumstances and "no mitigating
circumstance sufficiently substantial to call for leniency."

1 The statute placed the burden of establishing aggravating
2 circumstances on the prosecution and put the burden of establishing
3 mitigating circumstances on the defendant. The Court held

4 "[s]o long as a State's method of allocating the burden
5 of proof does not lessen the State's burden to prove
6 . . . the existence of aggravating circumstances, a
7 defendant's constitutional rights are not violated by
8 placing on him the burden of proving mitigating
9 circumstances sufficiently substantial to call for
10 leniency."

11 497 U.S. at 650.

12 Petitioner's Walton argument is that by allowing the state to
13 argue the absence of potential mitigating circumstances as
14 aggravating circumstances, it lessened the state's burden of
15 proving aggravating circumstances justifying petitioner's selection
16 for death. Had there been no legitimately aggravating
17 circumstances, this may have been error. But, as the California
18 Supreme Court found, the state met its burden by adducing "other
19 crimes" evidence, and there seems little doubt that the jury did
20 not depend solely upon the absence of mitigating evidence.

21 Thus, in the case at bar it was not error for the prosecutor
22 to argue that the lack of mitigating evidence as to those factors
23 should be construed as aggravating factors.

24 **VIII.**

25 **CLAIM W - JURY UNANIMITY ON UNADJUDICATED CRIMINAL CONDUCT**

26 Petitioner claims that the federal constitution required an
instruction that unadjudicated prior criminal conduct could not be
considered by the jury unless all jurors agreed that petitioner in
fact committed the offenses.

1 There is no federal constitutional requirement that the
2 sentencing selection decision be made by a jury and, hence, no
3 requirement that a jury unanimously agree upon defendant's guilt
4 of prior unadjudicated criminal activity or any other factor urged
5 in aggravation. See Walton v. Arizona, 497 U.S. 639 (1990). Thus,
6 petitioner's claim is without merit.

IX.

CLAIM X - VICTIM IMPACT

9 Petitioner claims that the prosecutor's plea for sympathy for
10 the victim's family denied him due process of law. The prosecutor
11 argued in pertinent part as follows:

12 I expect Mr. Christiansen in essence to be asking you for a little mercy for Mr. Ainsworth.

14 There is a proverb that says as a man shuts his eyes to
15 the cry of the poor he too will cry out and not be
16 answered. That's an indication of what your response
should be to any request for mercy in this case. Nancy
Huynh cried out for a break, cried out for a chance to
live and it fell on deaf ears. He too will cry out and
not be answered.

17 This plea for mercy will come in many forms and appeal
18 to your sympathy. His young child was brought into
19 court here, cried for you as if to tug at your heart
20 strings. If you want to feel any mercy or sympathy for
21 a child in this case, think of Michael Huynh, if you
want to think of sympathy for people in this case, think
of Nancy Huynh, think of Robert Huynh, think of the
lives that this has just utterly devastated.

22 RTA 3320-3321.

Such "victim impact" argument is a permissible method of reminding the sentencing jury of the specific harm caused by the crime in question, which is information necessary meaningfully to assess the defendant's moral culpability and blameworthiness.

1 Payne v. Tennessee, 501 U.S. 808, 825 (1991) (overruling Booth v.
2 Maryland, 482 U.S. 496 (1987) and South Carolina v. Gathers, 109
3 S.Ct. 2207 (1989)). See also People v. Edwards, 54 Cal.3d 787,
4 724-727 (1991). Accordingly, petitioner's claim lacks merit.

5 **X.**

6 **CLAIM Y - DESCRIPTION OF EXECUTION**

7 Petitioner claims that refusal to allow defense counsel to
8 read to the jury a press account of an execution denied petitioner
9 due process of law. A description of an execution is irrelevant
10 to petitioner's moral culpability, character, prior record, or the
11 circumstances of the offense. Thus it appears that he had no right
12 to present such evidence at the sentencing hearing. Harris v.
13 Pulley, 692 F.2d 1189, 1203-1204 (9th Cir. 1982), reversed on other
14 grounds, Pulley v. Harris, 465 U.S. 37 (1984); and Johnson v.
15 Thigpen, 806 F.2d 1243, 1250-51 (5th Cir. 1986). This claim will
16 be denied.

17 **XI.**

18 **CLAIM Z - BURDEN OF PROOF**

19 Petitioner claims that he was denied due process of law by the
20 trial court's instruction that "there is no burden of proof on
21 either side." This argument was rejected in Harris v. Pulley, 692
22 F.2d at 1194-1195, and the claim will be denied.

23 **XII.**

24 **CLAIM AA - DENIAL OF FULL CONSIDERATION OF MITIGATING EVIDENCE**

25 California Penal Code § 190.3(j) provided that the trier of
26 fact may consider "any other circumstance which extenuates the

1 gravity of the crime even though it is not a legal excuse for the
2 crime." Petitioner contends that the instruction precluded
3 consideration of mitigating circumstances that did not relate to
4 the crime.

5 The trial court instructed the jury that in determining which
6 penalty to impose the jury must consider, take into account, and
7 be guided by the statutory factors including "any other
8 circumstances which extenuates the gravity of the crime even though
9 it is not a legal excuse for the crime." RTA 3332. This
10 instruction was approved by the Supreme Court in Boyde v.
11 California, 110 S.Ct. 1190, 1196-1201 (1990) (the Court analyzed
12 factor (k) of 1978 law which is identical to factor (j) considered
13 in this case). For the reasons identified there, this claim shall
14 be denied.

XIII.

CLAIM BB - THE CUMULATIVE EFFECT OF THE ERRORS

17 Petitioner claims that the cumulative effect of the errors at
18 the penalty phase of his trial denied him due process of law.
19 Where asserted errors may have been unconstitutional, but where
20 findings of no prejudice as to the individual errors are made, the
21 errors en toto may nonetheless present a claim for cumulative error
22 sufficient to overturn a death sentence. Mak v. Blodgett, 970 F.2d
23 614 (9th Cir. 1992); United States v. Tucker, 716 F.2d 576, 595
24 (9th Cir. 1983). Here, petitioner has not pointed to any errors
25 which did not stem from counsel's inadequate performance, so this
26 claim is moot.

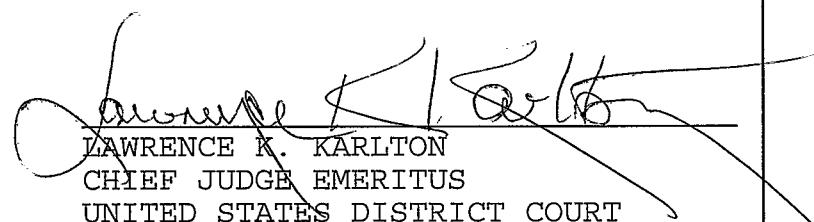
1 XIV.
2

CONCLUSION AND ORDERS

3 For the foregoing reasons petitioner's application for habeas
4 corpus on claim "R" is GRANTED, and his application on claims "S"
5 through "BB" is DENIED. Petitioner's sentence of death is hereby
6 VACATED, and the underlying matter is REMANDED to the Superior
7 Court of the State of California for the County of Sacramento to
8 either commence a new penalty phase trial or sentence petitioner
9 to life in prison without the possibility of parole within sixty
10 (60) days of the effective date of the order.

11 IT IS SO ORDERED.

12 DATED: September 2, 1999.

13 
14 LAWRENCE K. KARLTON
15 CHIEF JUDGE EMERITUS
16 UNITED STATES DISTRICT COURT
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United States District Court
for the
Eastern District of California
September 2, 1999

* * CERTIFICATE OF SERVICE * *

2:90-cv-00329

Ainsworth

v.

Vasquez

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Eastern District of California.

That on September 2, 1999, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office, or, pursuant to prior authorization by counsel, via facsimile.

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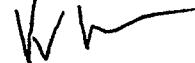
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